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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Improving Investment Advice for Workers & Retirees (ZRIN 1210-ZA29)

Ladies and Gentlemen:

PFS Investments Inc. (“PFSI”), a registered broker-dealer and an indirect wholly owned subsidiary of Primerica, Inc.¹ (“Primerica”), appreciates the opportunity to comment on the Department of Labor’s (the “Department’s”) proposed exemption “Improving Investment Advice for Workers and Retirees” (the “Proposed Exemption”).² We support the Department’s efforts to align the rules that apply to retirement accounts with those that apply more broadly to retail brokerage accounts under the federal securities laws. This comment letter highlights certain issues we have identified with the Proposed Exemption. We also provide suggested alternative approaches that we believe will help advance our shared goal of preserving middle-income investors’ choice and access to a wide variety of investment products and services, particularly through the brokerage services model.

I. Concerns Regarding the Department’s Interpretation of the “Five-Part” Test

We thank the Department for confirming that the United States Court of Appeals for the Fifth Circuit’s *Chamber of Commerce* decision vacating the Department’s 2016 “fiduciary rule” (the “2016 Rule”) reinstated the Department’s long-standing “five-part test” as the standard for determining whether nondiscretionary investment advice and recommendations are “fiduciary” for

¹Primerica is a leading distributor of basic savings and investment products to middle-income households throughout the United States. Our typical clients earn an annual income of \$30,000 to \$100,000, a category that represents approximately 50% of all U.S. households. Our business model allows our representatives to concentrate on the smaller-sized transactions typical of middle-income consumers and provides clients access to personal services that would usually not be available to middle-income investors with smaller account balances. We will open an IRA account for an individual with as little as \$250 to invest, or for \$50 per month.

²We have commented extensively to the Department, the U.S. Securities and Exchange Commission, and various state regulators regarding the standards that should apply to broker-dealers when providing services to retail investors. We would be happy to provide the Department with additional background on our historic positions in this area.

purposes of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and section 4975 of the Internal Revenue Code of 1986, as amended (the “Code”). The Department’s final rule and technical amendment to the Code of Federal Regulations should provide the industry with much-needed certainty as to whether firms or their investment professionals are acting as ERISA or Code fiduciaries when engaging with retirement investors.

However, we are concerned that the Department’s statements about the five-part test in the preamble to the Proposed Exemption will undermine this much-needed certainty and result in significant subjectivity as to when we may be viewed as acting in a fiduciary capacity to a retirement investor. Specifically, the preamble to the Proposed Exemption states that the Department no longer views its analysis in Advisory Opinion 2005-23A (the “Deseret Letter”) as correct and indicates that advice to roll out of an ERISA plan is now properly viewed as investment advice. Rollover advice would be “fiduciary” investment advice if it meets each prong of the five-part test. The Department then goes on to provide an entirely new interpretation of the five-part test’s prongs—an interpretation that has the practical effect of reinstating many of the elements of the 2016 Rule, potentially making any brokerage or rollover recommendation fiduciary investment advice.

The Department’s interpretation would capture sales activities in which advice is solely incidental to the sale, conflating the receipt of compensation incident to a recommended transaction with a payment for advice. Moreover, this new interpretation could apply retroactively to recommendations made since the five-part test was introduced in 1975—a result that could expose firms to significant risks under ERISA and the Code’s prohibited transaction rules. This result is inconsistent with the Securities and Exchange Commission’s (the “SEC’s”) approach in Regulation Best Interest (“Reg BI”), which expressly did not require broker-dealers to be fiduciaries under the securities laws, and it is also inconsistent with principles of administrative law by doing through interpretation what the Fifth Circuit concluded was impermissible by regulation.

Of particular concern are the following statements:

- ***Mutual understanding.*** The Department indicates its view that written statements disclaiming a mutual understanding that advice is fiduciary in nature are “not determinative, although such statements are appropriately considered in determining whether a mutual understanding exists.”³ This interpretation undermines our ability to define with specificity the nature and scope of our relationships with retirement investors by mutual contract and agreement. While we agree that boilerplate, fine print, and legalese may be ineffective in ensuring that a retirement investor understands whether fiduciary investment advice is being provided, it is important that the Department recognize that clear disclosures and contractual terms and agreements (i.e., a meeting of the minds) can

³ Improving Investment Advice for Workers & Retirees, Proposed Class Exemption 85 Fed. Reg. 40,834, 40,840 (proposed July 7, 2020).

be effectively used to do so.⁴ In short, investors should be able to define and agree to the scope of their relationship with their financial professional. To ignore the express understanding and agreement between the financial services firm and its client, ignores the “mutual understanding” prong in its entirety and can be viewed as reinstating the overly broad coverage and subjective standard of the 2016 Rule.

- **Regular basis.** The Department suggests that the regular basis prong is met not only where there is a preexisting fiduciary relationship with a retirement investor, but also where a recommendation is made *in anticipation* of an ongoing advice relationship. Under this interpretation, an investment professional who is acting in a sales role in encouraging a prospective customer to hire him or her to provide services could be viewed as an ERISA fiduciary for his or her marketing and soliciting efforts. While investment recommendations are subject to the best interest standard under the SEC’s Reg BI (when made by a broker-dealer), we do not believe it is reasonable to view such sales pitches as “fiduciary” under ERISA and the Code. As noted in the Fifth Circuit decision, fiduciary relationships connote “a special relationship of trust and confidence between the fiduciary and his client,”⁵ a relationship that is very unlikely to have been established in a first-time sales meeting. Moreover, in the rollover space for example, the Department’s new interpretation that the regular basis prong can be established by stepping together a rollover recommendation to an ERISA plan participant with expected investment advice to be provided to that person in his or her capacity as an IRA owner, is a novel and expansive reading of the prong. It also ignores the plain text of the regulation that speaks about rendering advice to “the plan” by conflating advice provided to the ERISA plan with advice provided subsequently to the IRA (a separate “plan”), or to the individual’s taxable account (not a plan at all).
- **Primary basis.** The Department would view recommendations made “pursuant to a best interest standard such as the one in the SEC’s Regulation Best Interest, or another requirement to provide advice based on the individualized needs of the Retirement Investor,”⁶ as creating an understanding, “that the advice will serve as at least a primary basis for the investment decision.”⁷ This interpretation inappropriately collapses two prongs of the five-part test (“primary basis” and “individualized”) into a single prong,

⁴ Our September 24, 2015 comment to the Department suggested the following disclosure as an example of an effective disclaimer: “I would like to be clear about the nature of our relationship. I am a salesperson, interested in selling you financial products. I am not what is called a ‘fiduciary,’ which is an advisor who owes undivided loyalty to you. Rather, we have a conflict of interest because I will receive compensation if you agree to purchase the products we are discussing, and I may receive more compensation from some of those products than from others. I will make recommendations to you, but please understand that you are buying financial products from me.” Comment Letter of Primerica, Inc. on Proposed Conflicts of Interest Rule (Sept. 24, 2015), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00615.pdf>.

⁵ *Chamber of Commerce of U.S. of Am. v. U.S. Dep’t of Labor*, 885 F.3d 360, 365 (5th Cir. 2018).

⁶ Department’s Proposed Exemption at 40,840.

⁷ *Id.*

leaving no room for individualized advice that may be provided by a broker-dealer or insurance agent clearly acting in a sales role. Not all individualized advice can in fact be reasonably understood to be a primary basis for an investment decision. We are also concerned that this interpretation could potentially result in any recommendation provided by a broker-dealer to be viewed as “fiduciary,” a result that was rejected by the SEC in differentiating the standards that apply to broker-dealers and investment advisers in promulgating Reg BI, and more importantly by the Fifth Circuit in its decision vacating the 2016 Rule.

- ***For a fee.*** The Department reiterates its broad view of compensation that may be considered as “for a fee” under ERISA’s and the Code’s definition of investment advice fiduciary. According to the Department, such compensation includes “all fees or other compensation incident to the transaction ... [which] may include, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions.” This interpretation fails to acknowledge and address the views that the Fifth Circuit expressed in its decision vacating the 2016 Rule. Specifically, the Fifth Circuit noted that the “DOL’s interpretation conjoins ‘advice’ with a ‘fee or other compensation, direct or indirect,’ but it ignores the preposition ‘for,’ which indicates that the purpose of the fee is not ‘sales’ but ‘advice.’”⁸ The Fifth Circuit goes on to make clear a key distinction between broker-dealers and investment advisers—that broker-dealers are compensated *for* sales and investment advisers are compensated *for* investment advice.⁹ The Department should recognize this distinction and acknowledge that, unlike investment advisers, broker-dealers do not provide investment advice *for* a fee unless they receive “special cash compensation” that would cause them to be subject to the Investment Advisers Act of 1940 (consistent with the SEC’s interpretations in this regard).

We question whether these interpretations in the preamble of the Proposed Exemption are permissible under the Administrative Procedures Act and understand them to be contrary to the Fifth Circuit’s decision vacating the 2016 Rule. In addition, we find the interpretations inconsistent with the intent of Executive Order 13891 ordering that agency proposals should have a deregulatory effect,¹⁰ and also inconsistent with the intent of Executive Order 13892, which

⁸ *Id.* at 373.

⁹ Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer, 84 Fed. Reg. 33,681 (July 12, 2019).

¹⁰ Executive Order 13891, issued on October 9, 2019, provides as follows:

Section 1. Policy. Departments and agencies (agencies) in the executive branch adopt regulations that impose legally binding requirements on the public even though, in our constitutional democracy, only Congress is vested with the legislative power. The Administrative Procedure Act (APA) generally requires agencies, in exercising that solemn responsibility, to engage in notice-and-comment rulemaking to provide public notice of proposed regulations under section 553 of title 5, United States Code, allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the Federal Register.

imposes restrictions on agencies' application of new standards of conduct through sub-regulatory guidance.¹¹

We encourage the Department to retract these new interpretations in conjunction with issuing a final class exemption. The Department should instead make explicit that the ERISA "five-part test" will be interpreted consistently with the Fifth Circuit's opinion regarding the 2016 Rule. Should the Department desire to withdraw its long-standing interpretations in the Deseret Letter or reinterpret the historic five-part test in such a newly expansive manner, we request that it do so through the regulatory process and subject to notice and comment.

II. *Concerns Regarding the Proposed Exemption's Conditions*

As discussed in more detail below, we further recommend that the Department modify the Proposed Exemption to (i) abandon its quasi-contractual requirement of a written fiduciary acknowledgement and instead make the exemption available to all fiduciaries (including, inadvertent fiduciaries); (ii) truly align with Reg BI by requiring compliance with federal and state conduct standards applicable to the recommendation, such as Reg BI and the best interest standard and other requirements included in the National Association of Insurance Commissioners Suitability in Annuity Transactions Model Regulation (the "NAIC Model Rule"), instead of

Agencies may clarify existing obligations through non-binding guidance documents, which the APA exempts from notice-and-comment requirements. Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA. Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply. Moreover, the public frequently has insufficient notice of guidance documents, which are not always published in the Federal Register or distributed to all regulated parties.

Americans deserve an open and fair regulatory process that imposes new obligations on the public only when consistent with applicable law and after an agency follows appropriate procedures. Therefore, it is the policy of the executive branch, to the extent consistent with applicable law, to require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.

¹¹ Exec. Order No. 13892, issued on October 15, 2019, provides as follows:

Sec. 3. Proper Reliance on Guidance Documents. Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it must establish a violation of law by applying statutes or regulations. The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations. When an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the agency's understanding of how a statute or regulation applies to particular circumstances. An agency may cite a guidance document to convey that understanding in an administrative enforcement action or adjudication only if it has notified the public of such document in advance through publication, either in full or by citation if publicly available, in the Federal Register (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect).

requiring compliance with the Department’s newly constructed impartial conduct standards; and (iii) address the Proposed Exemption’s overly burdensome and unusual report and recordkeeping requirements. We are concerned that if the final exemption fails to address these issues, the Department effectively will have reverted back to its prior approach under the 2016 Rule, which, as the Fifth Circuit acknowledged, will result in significantly reduced access to help and products for middle-income Americans.

A. *Eliminate the “Fiduciary” Acknowledgment Requirement*

The Proposed Exemption’s requirement that the financial institution and its investment professionals expressly acknowledge in writing their fiduciary status is deeply problematic and contrary to the Fifth Circuit’s *Chamber of Commerce* decision for the following reasons:

- ***The fiduciary acknowledgment renders the five-part test meaningless for those who would rely on the Proposed Exemption.*** The fiduciary acknowledgment should not be expected to provide any additional compliance value or consumer protection. Rather, it seems the value of the fiduciary acknowledgment is to create unnecessary potential liability and state-law claims, as discussed below, particularly because the Proposed Exemption is only needed by investment advice fiduciaries under the five-part test.
- ***A written fiduciary acknowledgement may create unilateral contract rights under state law, rendering the Proposed Exemption contrary to the Fifth Circuit decision.*** We appreciate that the Department does not intend that the fiduciary acknowledgment create a new private right of action between financial institutions and retirement investors. However, the written fiduciary acknowledgment is likely to be viewed by the plaintiffs’ bar as creating a unilateral contract from the financial institution for the benefit of the retirement investor. Whether that is the case could ultimately be determined in state court or arbitration—leaving the industry with little certainty as it assesses the costs and risks associated with reliance on the exemption.

As the Department is well aware, creating a private right of action was a fatal flaw of the Best Interest Contract Exemption as it “enable[ed] IRA holders to bring lawsuits against IRA fiduciaries, even though the Code itself gives IRA holders no private right of action,”¹² in violation of *Alexander v. Sandoval*, 532 U.S. 275 (2001). The required fiduciary acknowledgment could also be viewed as violating the Fifth Circuit’s conclusion that the Department cannot create a private right of action through its authority to issue class exemptions where one does not already exist by statute. Further, the Department’s statement of intent is made with respect to any *new* private right of action; it does not negate the broad private rights that would be available to an IRA account holder by reason of the

¹² Brief for Chamber of Commerce Plaintiffs-Appellants at 52, *Chamber of Commerce of U.S. of Am. v. U.S. Dep’t of Labor*, 885 F.3d 360 (5th Cir. 2018); see also Comment Letter of Gibson Dunn & Crutcher LLP on Proposed Conflicts of Interest Rule (July 20, 2015), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00547.pdf> (stating, “What Sandoval forbids is what the DOL attempts to do. Nothing in ERISA or the Code even hints that a state-law contract action can be brought against purported fiduciaries to enforce statutory provisions.”).

required acknowledgement, should a firm and its representatives be compelled to utilize the Proposed Exemption. As the Department is aware, section 4975 of the Code, which prohibits certain transactions involving IRAs, would not otherwise provide for any civil enforcement.

- ***Requiring a fiduciary acknowledgment will create investor confusion and is not consistent with the SEC's treatment of broker-dealers under Reg BI.*** In adopting its Reg BI, the SEC expressly declined to subject broker-dealers to the fiduciary standards that apply to investment advisers under the Advisers Act.¹³ Instead, Reg BI imposes elements of the Advisers Act fiduciary duty on broker-dealers, but tailors these duties to the brokerage business model with the stated purpose that to do otherwise would put the brokerage model in jeopardy, potentially harming middle-income investors. The SEC also requires both broker-dealers and investment advisers to inform investors of the best interest standard of care in Form CRS. While we appreciate that fiduciary status under ERISA and the Code has different implications than fiduciary status under the Advisers Act, we are concerned that requiring broker-dealers to acknowledge they are fiduciaries under ERISA and the Code will negate the efforts of the SEC in Reg BI to preserve the brokerage model and will create confusion for investors who may not understand the nuances of these different statutory regimes. It is unreasonable to expect a retirement investor to understand Form CRS's plain-language description of the investment professional's duties and services, while concurrently parsing a written statement declaring ERISA fiduciary status. The disclosure standards and obligations of the SEC and the Department should align without improperly creating new substantive rights or increasing investor confusion.
- ***The fiduciary acknowledgment may create obligations to monitor under state fiduciary laws, resulting in conflicts with the SEC's solely incidental interpretation.*** Various proposals by state securities regulators to impose a "fiduciary" duty on broker-dealers under state law would have broadly required broker-dealers to adhere to this duty continuously during their relationship with a customer. In response to comments raising concerns that this requirement would cause broker-dealers to be subject to the Advisers Act based on the SEC's interpretation that the provision of continuous investment advice or monitoring services is not "solely incidental" to a broker-dealer's brokerage business, the Massachusetts Securities Division (the "Division") revised its final rule to limit the circumstances under which the ongoing fiduciary duty would apply.¹⁴ However, one of the remaining circumstances is where the broker-dealer has a "contractual fiduciary duty."¹⁵ We are concerned that the Division (and other state securities regulators that adopt similar rules in the future) could view the Proposed Exemption's fiduciary acknowledgment as a "contractual fiduciary duty," which would create an ongoing advice obligation, that would in turn cause any broker-dealer that complies with the Massachusetts

¹³ Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,322 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240), <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf> (hereinafter, "Reg. BI").

¹⁴ Massachusetts Securities Division Adopting Release, Amendments to Standard of Conduct Applicable to Broker-Dealers and Agents – 950 MASS. CODE REGS. § 12.207 (Feb. 21, 2020), <https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Adopting-Release.pdf>.

¹⁵ 950 MASS. CODE REGS. § 12.207(1)(b)2.

fiduciary rule to provide advice that is not “solely incidental,” and to then be subject to the Advisers Act. The practical effect of the Proposed Exemption’s fiduciary acknowledgement may be that any broker-dealer registered in Massachusetts that relies on the Proposed Exemption (if finalized with the fiduciary acknowledgement condition) could be viewed as an investment adviser under federal law (thus eliminating access to brokerage recommendations in the Commonwealth of Massachusetts and other states that adopt similar rules).

We further note that the required fiduciary acknowledgment is a diversion from the Department’s historic class exemptions that do not require such acknowledgements (e.g., PTEs 77-4, 84-24, and 86-128). Such exemptions are available to provide relief to financial institutions that meet their conditions, including where they inadvertently trigger fiduciary status, which is of particular concern with rollover conversations, holistic financial planning, and the sale of insurance products.

Eliminating the requirement to acknowledge fiduciary status would increase investor protections, while preserving investor choice, as financial institutions may be more willing to choose to comply with the other conditions of the Proposed Exemption even with respect to transactions that may not clearly be the result of fiduciary investment advice—giving retirement investors the benefit of its higher standards in a broader range of relationships and interactions with financial institutions and investment professionals. Permitting firms to rely on the Proposed Exemption where they become inadvertent fiduciaries would go a long way in achieving parity with ERISA standards for IRA investors and rollover advice, while aligning those standards with the standards of the federal securities laws. If inadvertent fiduciaries remain excluded from access to the Proposed Exemption, the industry is less likely to adopt this new exemption.

Moreover, the fiduciary acknowledgment in the Proposed Exemption is duplicative with respect to ERISA plans, as ERISA plan fiduciaries are already required to disclose that they are fiduciaries when relying on ERISA section 408(b)(2). Thus, the main impact is to create greater uncertainty and litigation risks for financial institutions with respect to IRA investors through the potential private right of action, which, as noted above, the Fifth Circuit prohibited the Department from doing through class exemptions.

As such, we recommend that the Department eliminate the fiduciary acknowledgment from the final class exemption.

B. *Streamline the Annual Reporting/Recordkeeping Requirement*

We appreciate the Department’s intention to align the annual reporting and recordkeeping requirements with current requirements under the Financial Industry Regulatory Authority (“FINRA”) Rule 3130 and the securities laws. However, we note the following concerns:

- As the Department does not have jurisdiction to enforce the prohibited transaction rules vis-à-vis IRAs, the Department’s interest in and access to the annual report should be limited to ERISA plan transactions.
- The requirement for the review to be certified by the Chief Executive Officer is not reasonably justified and should be removed. Under FINRA rules, the chief compliance officer is responsible for testing policies and procedures and reporting results to executive officers. We are aware of no other comparable regulation with the requirement for a CEO to attest to a firm’s compliance. We request that this unnecessary requirement be removed.

- The requirement to make the financial institution’s records available to plan participants and IRA account holders appears on its face to serve the sole purpose of facilitating litigation. It is particularly questionable with respect to IRA account owners, given that the Department has indicated it does not anticipate that compliance with the Proposed Exemption (if finalized in its current form) would create a private right of action for IRA investors. Moreover, this requirement seems to create additional regulatory burdens that are not reflected in the Department’s Paperwork Reduction Act and other impact analyses, or the Department’s characterization of the Proposed Exemption as deregulatory. As such, we respectfully recommend that the Department remove this requirement from any final class exemption.

C. Impartial Conduct Standards

The Fifth Circuit vacated the 2016 Rule for imposing certain “impartial conduct standards” that mirrored ERISA’s fiduciary duties, including prudence, on investment advice and recommendations provided to IRAs. The court determined that the Department was acting outside its authority by imposing requirements that Congress chose not to apply to IRA accounts.

Here, again, the Proposed Exemption would require those who rely on it to comply with “impartial conduct standards” that have been revised from those included in the 2016 Rule, but continue to include ERISA’s prudence standard. We are concerned that this standard may not be permitted under the Fifth Circuit’s decision with respect to IRAs and we note that, with respect to ERISA plans, it is duplicative of the standard under ERISA section 404, which applies to ERISA plan fiduciaries regardless of whether they rely on the exemption.

We believe that including the prudence standard serves only to increase litigation risk, legal confusion and uncertainty, as well as the risk that Department interpretations could diverge from interpretations of Reg BI’s care obligation over time. We note that, after careful consideration, the SEC declined to use the term “prudence” out of concern that its subjective language put the brokerage model at risk. The SEC determined that the concept of prudence was unnecessary given the other requirements to satisfy Reg BI’s care obligation, which requires broker-dealers to “exercise reasonable diligence, care, and skill.”¹⁶

¹⁶ [Reg. BI](#) at 33,375. “We are persuaded by commenters that its inclusion in the proposed rule text to satisfy the components of the Care Obligation is superfluous and unnecessarily presents the possibility for confusion and legal uncertainty. We believe requiring broker-dealers ‘to exercise reasonable diligence, care, and skill’ conveys ‘the fundamental importance of conducting a proper evaluation of any securities recommendation in accordance with an objective standard of care’ that was intended by the inclusion of ‘prudence.’ Removing ‘prudence’ does not lessen nor otherwise change the requirements or our expectations under the Care Obligation, or Regulation Best Interest more broadly as it was duplicative of the phrase ‘diligence, care, and skill.’ The revised obligation, in requiring the broker-dealer to ‘exercise[] reasonable diligence, care and skill’ and to have a ‘reasonable basis to believe that the recommendation is in the best interest . . . and does not place’ the interest of the broker-dealer ahead of the interest of the retail customer, will continue to require an analysis that is comparable to the notion of ‘prudence’ as described in other regulatory frameworks, but does so using the terms ‘diligence, skill, and care’—terminology with which broker-dealers are familiar and that is well understood under the federal securities laws. As such, we believe that the revised

With respect to rollovers, the Department interprets “prudence” to obligate investment fiduciaries to undergo a search for, and review of, retirement investors’ existing plan information and even to consider alternate investor allocations within that plan, without regard to whether the investor is willing or able to assist in obtaining such plan information.¹⁷ This expectation is unreasonable, overly burdensome to both the financial institution and the retirement investor, and is not attainable in most cases. An investment professional should be expected to provide full and fair disclosure, exercise reasonable care, diligence, and skill and to have a reasonable basis to believe that the rollover recommendation is in the investor’s best interest.

We request the Department remove the impartial conduct standards, or at a minimum eliminate the “prudence” standard, from the Proposed Exemption and instead harmonize the requirements of the Proposed Exemption with those of the SEC’s Reg BI and the NAIC Model Rule by conditioning relief on compliance with applicable federal and state laws. The best interest standards under these rules meaningfully enhance the standards that apply to broker-dealers and insurance companies (and their agents) when providing recommendations to retail investors. These enhancements are thoughtfully calibrated to protect investors with heightened care, conflicts, and disclosure obligations, while protecting investor choice. These rules accomplish many of the goals the Department hopes to achieve through the impartial conduct standards and does so without further need for additional, or different, regulations, standards and wording that may impede investors’ choice of, and access to, investment products and services.

In light of these enhanced protections, we urge the Department to reevaluate the need for the impartial conduct standards generally, and the prudence standard in particular, and instead respectfully request that the Proposed Exemption condition relief on compliance with the standards of conduct of a firm’s prudential regulator.

D. *Self-Correction Methodology*

Including an appropriate self-correction methodology in the Proposed Exemption would encourage more widespread adoption and use of the exemption if finalized. A correction method could allow financial institutions to correct inadvertent errors within a reasonable time after discovery so that such errors do not automatically result in prohibited transactions and excise taxes.

language will minimize the potential confusion and legal uncertainty created by using a term that is predominantly interpreted in other legal regimes, and will aid broker-dealers in achieving compliance with Regulation Best Interest as well as permit broker-dealers to utilize existing compliance and supervisory systems that already rely on this language. Moreover, we note that certain commenters’ support for the term ‘prudence’ was based on our interpretation of the Care Obligation in the Proposing Release. As noted above, the removal of the term ‘prudence’ does not change the obligations or our interpretation of the Care Obligation, which we believe are addressed by the ‘diligence, care, and skill’ language and through Regulation Best Interest more broadly. In light of concerns regarding legal uncertainty associated with the term ‘prudence,’ and our view that its inclusion or removal would not change the requirements or expectations of Regulation Best Interest, we have determined to remove it from the rule text.”

¹⁷ Department’s Proposed Exemption at 40,840.

While we welcome and appreciate the Department's reinstatement of the five-part test and its proposal of a class exemption intended to align with the SEC's Reg BI, we believe the Proposed Exemption would be better harmonized with the strong national standard established in Reg BI and the decision of the Fifth Circuit Court of Appeals, and in compliance with the Executive Order 13891 and 13892, if the Department makes the following changes to the final proposal:

- Remove the preamble interpretation of the five-part test
- Eliminate the fiduciary acknowledgement requirement and permit the exemption to be used by all investment advice fiduciaries, including inadvertent fiduciaries
- Remove the reporting requirement with respect to IRAs
- Do not require CEO attestation
- Remove the obligation to make records available to IRA account holders
- Replace the impartial conduct standards with a requirement to comply with state and federal laws applicable to recommendations
- Include procedures for self-correcting inadvertent errors in compliance with the exemption's conditions

We thank the Department for its efforts in this matter. We would be pleased to discuss with the Department any issues raised in this letter or more generally related to the Proposed Exemption.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kahl", with a horizontal line extending to the right.